

# Senator Adam Kline

37TH LEGISLATIVE DISTRICT • JANUARY 2004



Dear Neighbor,

That wonderful summer's gone now, golden days all in a row like a Mariner's winning streak, and the cold rain is on us once again. It's coming to that time now when your legislators sadly take leave of their neighbors and families and head for Olympia to do The People's Business. In this news-letter, I'll cover a few of the issues we face this year.

This session we will witness the slow decline of Western Civilization. Well, maybe that's a bit much. Let me try that again. This session will be dedicated to covering last year's massive mistake of approving a No New Taxes budget. We'll be pretending the voters had good intentions when they approved a series of

mindless tax-cuts, and that state government is running on rational and sustainable footing. Don't worry. Be happy. So let's think nice thoughts.

First, our doctors and hospitals, suffering from a decline in Medicaid reimbursement rates, deserve a break from the sudden rise in the cost of medical malpractice insurance. I've been recently working with the Insurance Commissioner and others to draft legislation that addresses this problem while still protecting the rights of malpractice victims to receive compensation for the full amount of damages, as decided by a jury.

Second, given our growing prison population and the high cost of incarceration, we're headed for a collision between two conservative mantras: "Lock 'em up and throw away the key" on one hand and "No new taxes!" on the other. Never mind that the very same folks urge us to do both. Conservatives are going to have to figure out how to pander to those folks:



by maintaining our low taxes or by maintaining our long sentences? They can't do both. It'll be fun to watch them try.

Third, some background to the near-closure this past year of the former Branch Villa nursing home in the Central Area, and the problems with Medicaid that are forcing more nursing home closures.

These are just three of many issues we'll be tackling this year. Space here is limited so if you really want an earful, or if you have your own issue you want to rant about, pick up the phone and call me. I can be reached at (206) 625-0800, or emailed at [kline\\_ad@leg.wa.gov](mailto:kline_ad@leg.wa.gov). You will get an answer; I guarantee it.

Yours truly,

Adam Kline

## Medical Malpractice Reform, For Real

For many years now, the insurance industry's party line on this subject has been broadcast widely, and is now one of those horrendous untruths that become ingrained in the public consciousness by simple repetition. It's deceptively simple: Your dear doctor is being driven out of practice, or at least out of Washington, by outrageous increases in his/her medical malpractice insurance premium because of frivolous lawsuits. The remedy is to make it tougher to bring lawsuits for medical malpractice, and to keep juries from awarding full compensation as they see it.

Simple, huh? Simple and dead wrong. Yes, the increase in malpractice premiums is real, very sudden, and very steep, and doctors – not to mention all of us patients – are rightfully concerned. But the rise in premiums is not limited to doctors' policies; it also became a problem very suddenly for home-builders (especially those who build condominiums), and for long-term care institutions such as nursing homes and adult family homes. All three industries experienced major rate increases very suddenly in 2001-02. It's

even gotten to the point that builders can no longer find any insurance at all for condominium projects, with the result that they're not being built. In short, it is systemic within the insurance industry as a whole, not a result of medical lawsuits. Yet the insurance industry would have us believe that juries (that's 12 of us citizens, who have been carefully chosen for fairness and who listen to the facts of a particular case, sometimes for weeks, before passing judgment) have suddenly begun recklessly awarding millions to frivolous or even fraudulent claimants. It's those "runaway juries."

The more complicated the truth, the harder for it to gain public understanding. In fact, we've had this same controversy in the mid-1980's, and before that, each time the stock and bond markets have experienced a sudden tumble. Insurance companies earn billions in the stock and bond markets during bull markets, by investing a portion of their reserves, the money they are required to keep on hand to pay claims as they arise. These investments are quite proper and perfectly legal. High stock earnings encourage them to invite more dollars into their reserves by lowering their premiums, sometimes to unsustainably

low rates, because their real profits aren't in the insurance industry at all, but in the stock and bond markets. In the recent "bubble" economy, stock earnings were unbelievably high, and as a result insurance premiums were unbelievably – and unsustainably – low. Then came the bear market of 2001-02, and insurers' reserves were not merely losing their investment income, but were decreasing in value altogether. Companies then had to raise their rates by breathtaking percentages to get back to simple profitability.

Rather than explain this to consumers—and it is, after all, quite legal—the industry has seized the opportunity to engage in a concerted campaign against the jury system. Their chief proposal is to cap jury awards. Their second is to make malpractice claims pass through impossible procedures before even getting to the jury at all. Their third is to make the jury apply a standard of proof in medical malpractice cases that is almost as restrictive as the "beyond a reasonable doubt" standard used in criminal cases. The effect of these changes is to make it impossible for even the most seriously injured patients

*(Continued next page)*

# Senator Adam Kline Legislative Update

*(Medical Malpractice – continued)*

— and that could be any of us — to recover damage caused by malpractice.

Contrary to the insurance companies' assertions, our state has seen no "explosion" in jury awards — their number has stayed flat over the last decade when adjusted for population growth. The danger of these proposals is not just the money — these attempts to muzzle juries would save insurance companies several million dollars per year, a tiny fraction of the billions they need to recoup in lost reserves. Rather, it is the very notion of limiting the accountability of major corporations to their consumers, and worse, the notion of doing that by drastically limiting the role of the jury in American law.

Still, doctors, builders, and the long-term care community need insurance coverage at reasonable rates. I'm now drafting a proposal, with the help of our Insurance Commissioner, and with some great advice from the consumer group Washington Citizen Action, that would require insurance companies to report to the Commissioner the underwriting criteria they plan to employ for all lines of casualty insurance when they seek a rate increase. Once the rate increase is granted, based on the underwriting criteria, the criteria must be followed for as long as the rate is in effect. No longer will a malpractice carrier, for example, be able to claim "We need a 20% increase just to stay in business," then, after getting it, promptly drop all high-risk specialists like gynecologists — a move that would

have permitted them a handy profit even with, say, a 2% increase.

This remedy is in the true best interests of the doctors, hospitals, and related professions. Too often in the past, professional rivalries and an unhealthy fear of lawyers have caused our doctors to side with their true opponents in this game, the insurance industry. Doctors, of all people, should be able to diagnose this illness as one that is systemic in the industry as a whole, and recognize that the rise in their own rates is symptomatic of that deeper problem. I am a strong believer in accountability, corporate as well as personal. I hope that like-minded folks in the medical professions can be persuaded to remove themselves from the insurance industry's attempt to silence those 12 people who represent us all in the name of justice.

## Crime and Punishment

With the recent epidemic of tax-cutting initiatives now taking effect, state revenues are going down dramatically. Readers of these pages have seen my rants on the tax initiatives before, and anyway I promised you just now to stay off that subject, so I won't bore you with a recap. Don't worry. Be happy.

So let's talk about something that's going up instead of down: our burgeoning population of prisoners, and the cost of incarcerating them. Mind you, our prison system takes up roughly 5% of our operating budget, not our biggest expense (that would be K-12 education) nor our fastest-growing (that's the inflation-prone health care sector), but one I've chosen for today's rant because cutting it is actually good policy. And since politics is the art of the possible, I'm happy to report that success here is not merely possible but already underway. We took our first step in 2002 by substituting drug-treatment for some months of prison time for drug offenders. We have a long way to go, and I have a few ideas to get us on our way.

First, an overview. In 1984, we began implementing the Sentencing Reform Act, which more closely regulated the judges' discretion in sentencing by using two criteria: the seriousness of the crime, and the number of that defendant's prior felony convictions. That bill had created a kind of graph by which the judge determines the sentence. On the vertical axis, felonies are ranked in seriousness upward from 1 to 16, the former being minor property crimes and the latter Aggravated First Degree Murder. On the horizontal axis, numbers of the defendant's prior felonies are arrayed from zero to 9. For

any given case, there is a point where the two axes intersect, and for that point there is a range of possible sentences, expressed as a minimum and a maximum. The judge can sentence within that range, no questions asked. If there are aggravating factors, the judge can exceed the max, and if there are mitigating factors, the judge can go under the minimum. You get the idea.

The Act was the result of several years of consideration, debate, and compromise. The idea of a graph that identified a particular sentence-range was intended to curtail the judges' discretion, which was blamed for disparities in sentences, sometimes along racial lines. The ranking of felonies by seriousness was a well-thought-out, though necessarily subjective, enterprise. (Is Theft 2nd Degree more or less serious than Embezzlement?) There was a certain logic and consistency to the law, and that itself was a step up.

But since 1984, a less logical, more punitive, attitude has torn the graph's consistency. Legislators, ever anxious to show the voters that they're tough on crime, have seized upon gruesome crimes committed back home, and called for ever more serious punishments. An entire generation of criminologists now has appeared before the Judiciary Committees to remind us that long sentences do not — repeat, do not — deter crime. Most legislators know that. Deterrence requires some knowledge of the law, or at least a willingness to think about the conse-



quences — not common characteristics of the guys in the slammer. But we also know that many folks back home are convinced otherwise, and are motivated by anger and revenge, and demand longer sentences. "Lock 'em up forever!"

We like to think of ourselves as leaders. But sometimes, folks, my colleagues just follow the voters even when we know they're wrong. In 1994, when the NRA, in an effort to divert attention from the mounting evidence that the easy availability of guns was a major factor in crime, ran an initiative to simply impose a life sentence for a third violent offense ("Three Strikes You're Out"), it passed overwhelmingly. Ditto the following year for an initiative imposing an additional five years for the criminal use of a gun ("Hard Time for Armed Crime"). Conservative legislators got the message, and in a rain of bills that set new records for sheer posturing, increased sentences for whichever offenses had most gruesomely been committed in their districts — logic and consistency be damned. The result has been to escalate sentences long beyond the time needed for deterrence, so long that the older and more humane goal of rehabilitation (which anticipates release) is rendered impossible.



*(Crime & Punishment – continued)*

This gets expensive, too. The Department of Corrections estimates the cost of incarcerating the average prisoner at just shy of \$26,000 per year. In 1986, we had a prison population of about 8,000. Since then, legislative acts and voter initiatives have added about another 8,000 to our prison population, and are predicted to add a total of almost 11,000 prisoners by 2017. (No, that's not the whole Corrections population; that's additional to the 1986 baseline; that's prison-time due solely to sentencing laws passed since then. At \$26,000 a pop, that's \$208 million now, and headed for \$286 million per year in new costs to be paid with your tax dollars, for dubious value in correcting criminal behavior. Yes, that's the annual cost. (And forget the human costs; we're just talking dollars here.)

Here's the kicker. The same folks who holler "Lock 'em up forever!" have more recently been chanting "No New Taxes!" (Read that over a few times until the irony kicks in.) That's right, folks, another version of that old song, "I want more! I want more! And I won't pay for it!"

Now my conservative colleagues are all a-broil with the coming Armageddon. State government has been starved of funds — I believe purposefully, by conservatives who lost the honest argument about how much government we want and how much we'll pay for it, and are now waging an argument that is solely about taxes. Taking advantage of a generation of voters who were not required to pass Civics (it hasn't been required in Washington high schools since the mid-1980's, an omission of gargantuan proportions), they have convinced a lot of honest folks that we are over-taxed and that repealing taxes — starting with the taxes paid by the rich, of course — will have no ill effects whatever. Now the mob is gathering.

This presents conservatives with a choice. They can pander to that mob by maintaining our over-long sentences, or they can pander by maintaining our inadequate tax-revenues. Logically, they can't have it both ways. But the essence of pandering is a defiance of logic, a firm agreement with the angry voter no matter what. Gutless surrender is passed off as leadership. My guess is there will be a fine display of this art form in the coming session. Ultimately, I think tax-politics generates more public anger than crime these days, and public anger determines the agenda for conservatives. That's what I love about this job — a front-row seat at a great performance.

Don't worry. Be happy.

## Honor Thy Father and Thy Mother

It was only a matter of time before cuts in health care came home to roost. This past year, an ad-hoc group of African-American activists in the Central District fought a long struggle to keep the former Branch Villa Nursing Home from being closed down by the Department of Social and Health Services (DSHS), as a result of insolvency. Closure of the home would have left 171 elderly, frail, and medically needy people to be transferred to other nursing homes out of easy contact with their families and supporters.

Branch Villa, a functional building just east of Rainier Avenue, had long served a largely minority resident population, and had relied more than most nursing homes on Medicaid. In recent years, Medicaid's reimbursements to nursing homes had failed to keep up with the rising cost of care. Because it had taken on such a high proportion of Medicaid patients — some 90% — Branch Villa was the first to feel the pinch. Others in poor neighborhoods across the state have already followed it into insolvency.

Branch Villa's residents have worked all their lives, nurtured families, paid their taxes, and generally played by the rules. Come old age, they, like all of us non-millionaires, worried about how they could avoid burdening their families. Now, though some suffer from disorientation and other severe medical and psychological problems that attend old age, they are members of a close-knit community of peers, a dedicated staff, and caring visitors. (One visitor told me of how she struck up a years-old friendship with her mother's friend, a woman from Florida who had no family in Seattle, when she realized they both liked old R&B songs from the 1970s. Once they sang Dionne Warwick's "Walk On By" in the hallway — "and nobody told us to shush!") The nursing home, though hardly a palace, was warmed and lighted by a strong sense of community, borne of similar experiences and common culture dating from pre-civil rights times, and it eased the pain of aging.

The decision to close Branch Villa was made by DSHS in Olympia, not the local office. I believe it was a mistake, which DSHS Secretary Dennis Braddock eventually did his best to rectify. One local agency manager literally broke into tears telling me of the reaction of residents and families in the first days after it was announced.

The outrage that motivated our Central District activists to fight the home's closure is not hard to understand: just visualize these anxious elderly people — of your parents or grandparents —



being told by staff of a company DSHS hired for that purpose: "We're going to close this place down by the end of the month. We have a bed for you in another nursing home. It's in...uh...Puyallup."

The activists, who later took on the name Friends of Branch Villa, wasted no time in seeking a buyer for the home. But that was a process that we knew would take some time. Acting as lawyer for the residents, I went to court to keep DSHS at bay for as long as it took. Eventually, with DSHS barred by an injunction from removing more residents for a period of almost three months, the Friends located the Opportunity Industrialization Center, a group headquartered in Yakima, which operated a variety of social service programs. The OIC, headed by former Yakima mayor Henry Beauchamp, purchased the home and re-named it the Leon Sullivan Health Care Center. Reverend Leon Sullivan was a social activist and educator responsible for leading international efforts to promote nonviolent social and economic change.

What brought us to this sorry state, and how can we avoid more closures that will irretrievably harm the weakest members of our parents' and grandparents' generation?

The Legislature, acting under a federal grant of authority, sets the Medicaid reimbursement rate, the amount of combined state and federal money paid to doctors, hospitals, nursing homes, and other health care providers who serve patients eligible for Medicaid. Eligibility for Medicaid is based on a combination of low income and age or disability. The reimbursement rate has never been realistic. Doctors, hospitals and nursing homes who serve these patients have long done so as a public service.

In the 2001-03 budget cycle that ended this past July, we invested \$4.8 billion as the state's share of the over-all Medicaid program, for coverage that extends to over 127,000 disabled people, 357,000 children in poverty, and 67,000 indigent seniors. We had succeeded in reducing the percentage of uninsured from 13% to 9% in the previous eight

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Senator

Adam Kline

Legislative Update

(Honor Thy Father – continued)

years — an achievement we can be proud of. About a half-billion of that money went to nursing homes, at the average rate of \$129.58 per patient-day. (Actual rates vary by degree of illness, local labor costs, and a variety of other factors.) The pattern in four of our last five fiscal years is that the actual cost of care to homes — subject to the vicissitudes of inflation — has risen faster than the daily reimbursement rate. Year after year, these discrepancies accumulate.

Into this picture of growing danger, enter the No New Taxers. (Yeah, government spending is waste. Uh-huh. Uh-huh. Heard it on the radio.) Our Governor, to the loud delight of many of my conservative colleagues, rolled out a No New Taxes Budget. In it, Medicaid funds for nursing homes took a 7% decrease — that’s right, not an increase smaller than inflation this time, but a decrease, as in less in absolute dollars than last year, as in deep trouble. Meanwhile, the actual cost of care increased by over 4%. This would have meant another whopping addition to the accumulated discrepancy between the reimbursement rate and actual costs.

In response, representatives from the nursing home industry proposed mandating a “quality maintenance fee” of roughly \$9.25 per day on all nursing home beds. The proposed tax would apply to all residents, whether Medicaid or private-pay. That’s right, the industry asked the legislature to tax them, because the money would be doubled and returned to them. Because, as a practical matter, the revenue would be earmarked entirely for Medicaid reimbursement, this revenue would gen-

erate matching funds from the federal Medicaid program.

I co-sponsored this bill, along with a bi-partisan group of about a half-dozen other legislators, because I thought it was a creative short-term strategy of closing the gap between the reimbursement rate for Medicaid patients and the actual cost of caring for those patients.

In the final bill that came before the Senate, the daily fee was decreased to \$6.50 a day. By this time, I’d had extensive conversations with nursing home advocates who didn’t support the bill. Although this bill had a lot going for it, it taxes the private-pay as well as the Medicaid patients, and the reimbursement is for the benefit of the Medicaid patients only. In effect, the elderly private residents would be subsidizing Medicaid at the rate of \$6.50 per day, or \$195 per month, or almost \$2400 per year.

It’s one thing to tax the wealthy more than the poor, and to use those proceeds for programs that benefit the poor. I’m all for that. But these elderly people are not wealthy at all, just working-class and middle-class folks whose life-savings are still in the process of being exhausted until they qualify for Medicaid. At the rates charged by even the most cost-conscious nursing home (at least \$ 4,500 a month), it doesn’t take long to exhaust the life-savings of people, even if they’ve lived comfortably in their productive years.

After much thought, I decided to vote No. This was a tough vote for me. There were reasonable and thoughtful legislators on both sides of this issue. Ultimately, I decided to draw the line here, and not to vote to exacerbate the problem. This new

legislation will push more private pay individuals onto Medicaid sooner. The final 2003 Budget, which included the expected fee revenue, increased Medicaid nursing home funds by less than 5% from last year. The quality of care that nursing homes are able to offer will continue to drop.

Meanwhile, in a year that has already seen a record number of nursing home closures because of Medicaid funding problems, Mr. Beauchamp and his organization took a major gamble by entering a field in which they are paid less than the cost of the much-needed service they provide. They deserve the support of the entire community in this endeavor. If, Heaven forbid, they fail, and the home must close, I have a request of the No New Taxers. On the day they come with the ambulances, I want them to stand with me at the gate and watch as these elderly people, confused and anxious, are dispersed and transported to nursing homes in Puyallup and Marysville and Auburn, away from daily contact with their families, away from their cultural “hometown” and familiar surroundings. Then I want them to look me in the eye and tell me this was wasteful government spending, and that the funding cut was a good thing.

As medical and nursing costs climb, and more homes are forced to close, the rich will have the equivalent of gated nursing communities. What will happen to the rest of us?

Oooooooooops!

Did I say I was going to help you Be Happy by writing about other stuff besides our lousy revenue situation? Did I say that? Well, here’s a secret: nothing significant we do is independent of our lousy revenue situation! Sorry.

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